

**In the United States Bankruptcy Court
for the**

Southern District of Georgia

Savannah Division

FILED

at 10 O'clock & 45 min A M
Date 6/16/03

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia *PB*

In the matter of:

JAMES C. CARSTARPHEN, JR.

Debtor

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Chapter 13 Case

Number 02-43450

AMENDED ORDER CONFIRMING PLAN

The relevant facts established by the record in this Chapter 13 proceeding are as follows. On October 21, 2002, James C. Carstarphen, Jr. ("Debtor") filed for relief under Chapter 13 of the Bankruptcy Code. On November 5, 2002, an "Order Upon Employer" was issued to the U.S. Army Finance and Accounting Department to withhold specified amounts from Debtor's paycheck. A Creditors Meeting was held pursuant to 11 U.S.C. § 341 on December 6, 2002, and Debtor failed to appear. In a hearing regarding Debtor's absence, Debtor's counsel explained that he was deployed to Kuwait as part of his service in the United States Army. On March 25, 2003, Trustee filed a Motion to Confirm Plan as Amended. Trustee's only modification to the plan was to make confirmation contingent on the § 341 meeting being concluded after Debtor returned from military service in Kuwait. On March 25, 2003, I issued an Order Confirming Plan which this Order further clarifies.

A. § 341 Meeting of the Creditors

Debtors in a bankruptcy case have few responsibilities imposed upon them as a condition to receiving substantial benefits; however, one of the most important responsibilities is the requirement of 11 U.S.C. § 343 stating that, “[t]he debtor *shall* appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title.” (emphasis added). One purpose of the meetings is to verify the debtor’s identity. Further, the meeting may provide information leading to the recovery of assets for the estate, grounds to challenge the discharge of the debtor, or other information pertinent to the administration of the debtor’s estate.

Pursuant to 11 U.S.C. § 341, upon entry of an order for relief, the United States Trustee is required to convene and preside over a meeting of the creditors in the case. The Rules specify that in a Chapter 13 case, the meeting must be held not less than 20 nor more than 50 days after the order for relief is entered. Federal Rule of Bankruptcy Procedure (F.R.B.P.) 2003(a). Further, those time constraints cannot be enlarged or reduced by the Court. F.R.B.P. 9006(b)(2) and (c)(2).

On its face, the mandate of §343 that “[t]he debtor shall appear” is both unequivocal and mandatory. Failure of a debtor to attend the meeting of the creditors may be grounds for dismissal. This Court has recognized that physical appearance at the § 341

meeting is mandatory. See In re Michael, 285 B.R. 553, 556-7 (Bankr. S.D. Ga. 2002) (Davis, J.) (denying inmate's request for leave to appear telephonically at first meeting of creditors).

Despite the mandatory language, some courts have excused a debtor's physical appearance at a § 341 meeting; however, it has only been in the most exceptional of circumstances. See In re Bergeron, 235 B.R. 641, 644 (Bankr. N.D. Cal 1999) (excusing 89-year old debtor who suffered from blindness, senile dementia, renal failure and prostatism from attending meeting); In re Stewart, 14 B.R. 959, 961 (Bankr. N.D. Ohio 1981) (debtor's attendance at first meeting of creditors waived where debtor was suffering from a serious heart condition). But see In re Import Toy Sales, Inc., 41 B.R. 784, 785 (Bankr. S.D. Fla.1984) (not excused when debtor corporation's principal officer suffered heart attack and was hospitalized); In re Martin, 12 B.R. 319, 320 (Bankr. S.D. Ala.1981) (case dismissed when debtor suffered stroke and was confined to nursing home and could not attend). Courts in these situations often validate their holding by relying upon general equitable powers while saying that attendance at the meeting can be waived, "where a good sufficient reason is given." Stewart, 14 B.R. at 961.

This Court has occasionally deferred the mandatory attendance requirement in some particularly compelling cases, when there is no objection by any creditor, basing its

power to do so on 11 U.S.C. § 105, and almost invariably, limited to cases in which one spouse in a joint case appears and one does not. In this case, however, there is no spousal appearance, yet there exists a more compelling rationale.

B. Soldiers' and Sailors' Civil Relief Act of 1940

Courts generally deny motions by military personnel to be completely excused from attendance at the §341 meeting of creditors because of their military service. See In re Agan, 285 B.R. 324, 326 (Bankr. W.D. Okla. 2002); In re Ladner, 156 B.R. 664, 665 (Bankr. D. Colo. 1993). However, the requirement of §343 that the debtor "shall" attend such meeting can be stayed. The SSCRA provides that:

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

50 App. U.S.C.A. § 521

Pursuant to the SSCRA, there are two ways that any action or proceeding against a military

personnel can be stayed. First, the court *may*, on its own motion, stay the action if it finds it within its discretion. Second, the Court *shall*, on application by the service person or someone on their behalf, stay any action *unless*, in the opinion of the court, the ability of the service person to prosecute the action is not *materially affected* by reason of his military service. Further, the Supreme Court has held that, in applying the SSCRA, there is no rigid doctrine of burden of proof for showing that a party will or will not be prejudiced. See Boone v. Lightner, 319 U.S. 561, 569-70, 63 S.Ct. 1223, 1228-29, 87 L.Ed. 1587 (1943) ("We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment").

1. Persons Who Qualify for Relief Under the SSCRA

50 App. U.S.C.A. § 511 defines the persons who qualify for relief under the SSCRA by stating that:

(1) The term "person in the military service", the term "persons in military service", and the term "persons in the military service of the United States", as used in this Act [sections 501 to 591 of this Appendix], shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Air Force, the Coast Guard, all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy, and all members of the National Guard on service described in the following sentence.

In short, any person on active duty¹ in the armed forces of the United States is protected by the SSCRA.

Section 521 seems to limit the SSCRA to plaintiffs and defendants; however, the Supreme Court has held that the SSCRA should be liberally interpreted so as to "protect those persons who have been obliged to drop their own affairs to take up the burdens of the nation." Boone, 319 U.S. at 575, 63 S.Ct. at 1231. In that vein, the phrase "either plaintiff or defendant" should not be strictly construed. Instead, the SSCRA also applies to those who are "petitioners, respondents, movants or interveners." Shire v. Superior Court In and For Greenlee County, 63 Ariz. 420, 425, 162 P.2d 909 (Ariz. 1945). The phrase, "was intended to expand, rather than to limit, the scope of the protection afforded by the Act." In re Adoption of a Minor, 136 F.2d 790, 791 (App. D.C. 1943). Accordingly, a "debtor" in a bankruptcy proceeding falls within the protection of the SSCRA. See Ladner, 156 B.R. at 666. Since Debtor is currently a member of the United States Army, he is clearly a "person in the military service" as proscribed by §521 and the SSCRA applies to him in this instance.

2. Limitations of the SSCRA

¹10 U.S.C.A. § 101(d)(1) states:

The term "active duty" means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.

It should be noted that a stay pursuant to the SSCRA is not automatic by reason of one's military service. See Boone, 319 U.S. at 565, 63 S.Ct. at 1227 ("The Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service."). Instead, military personnel must be materially affected by reason of his military service. See First Union Mortgage Corp. v. Rush (In re Rush), 1990 WL 10007403, *3 (Bankr. S.D. Ga. 1990) (Dalis, J.) (denied stay of hearing for relief from stay after determining that debtor, located in Germany, is not materially affected by reason of military service, but granted debtor additional time to communicate with attorney); Tolmas v. Streiffer, 21 So.2d 387, 389 (La. App. 1945) (defendant in military not entitled to stay where could have done no more than give same testimony as was given by father). Likewise, the SSCRA is not a carte blanche for a debtor to avoid his obligations. See Jamaica Savings Bank v. Bryan, 175 Misc. 978, 979, 25 N.Y.S.2d 17 (N.Y. Supp. 1941) ("act by no means contemplates that persons able to meet their obligations may set up the act in bar to prevent creditors from pursuing their remedies"). Instead, it only operates to stay proceedings when the military service in fact has prevented or is preventing a member of the military forces from meeting the obligations or requirements imposed on them. Finally, courts have disapproved of debtors using the SSCRA as, "a sword against persons with legitimate claims." Engstrom v. First Nat. Bank of Eagle Lake, 47 F.3d 1459, 1462 (5th Cir. 1995).

3. Confirmation of Plan

Normally, a case is dismissed, after notice, for a debtor's failure to attend the § 341 meeting of creditors. Here, however, the Debtor, unlike the debtor in Michael, falls into the "honest but unfortunate" category and has been prevented from attending the § 341 meeting because of his overseas service in the United States Army. He clearly falls under the protection of the SSCRA and his ability to prosecute this case would be materially and adversely affected if the mandatory requirements of § 343 were applied in such manner as to result in the dismissal of his case. As a result, I conclude that, pursuant to the authority of the SSCRA, Debtor's appearance at and the conduct of the § 341 meeting is stayed pending his return to the United States. However, this remedy alone is not sufficient to protect all interests involved. Debtor's payments are being timely remitted to fund his plan but the Trustee who is directed to retain any funds paid under the proposed plan until confirmation cannot disburse those funds to creditors. 11 U.S.C. § 1326(a)(2)². Which begs the question, if dismissal of the case would violate the SSCRA as I hold, can the case be confirmed in order to permit disbursements? Should it be? As to the latter question, requiring Trustee to retain those funds until Debtor is able to attend the § 341 meeting would create substantial hardship and inequity inasmuch as Debtor, or his family, still has use of

²1326(a)(2) provides that:

A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan. If a plan is confirmed, the trustee shall distribute any such payment in accordance with the plan as soon as practicable. If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

his property yet the creditors are stayed from collection efforts and are not receiving any payments. Clearly, the plan "should" be confirmed. But "can" it be? 11 U.S.C. § 1325(a)(1) allows a court to confirm a plan if, "the plan [and presumably the proponent] complies with . . . applicable provisions of this title." Mandatory appearance at a § 341 meeting is such an applicable provision, and Debtor's personal appearance and examination under oath by creditors is an essential tool in determining whether the plan "complies with . . . applicable provisions of this title." Accordingly, failure to appear would ordinarily bar confirmation. *See* 11 U.S.C. §103(a) (making chapter 3, and thus §§341 and 343, applicable to a case under chapter 13).

Debtor's case was scheduled for confirmation on March 25, 2004. At that date, his payments were current. Further, no creditor objected to confirmation of his plan. 11 U.S.C. §105 authorizes this Court to, "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This Court realizes that § 105 should only be used sparingly and only to effectuate other provisions of the Code - not to create statutory authority where none exists. Nevertheless, it is necessary that I utilize it here in order to adhere to the requirements of the SSCRA, while not impairing the interest of creditors by refusing to confirm the plan, at least conditionally. Thus, I hold that § 105 empowers me to confirm the Debtor's plan, despite the fact that the § 341 meeting has not been concluded, in order to permit disbursements of funds to holders of allowed claims. I

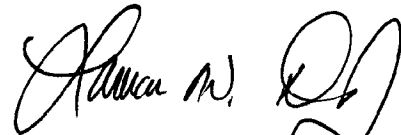
further hold, however, that I may, and will, retain jurisdiction to revoke confirmation until after the debtor appears at the § 341 meeting, which will be stayed until his return to the United States. At that time, he must satisfactorily answer all questions and perform all other duties incumbent upon a Chapter 13 debtor. Grounds for revocation of confirmation shall not be limited to "fraud" as contemplated by 11 U.S.C. § 1330(a), but may include any basis that, if known, would have provided the foundation for denying confirmation as of the date of the initial confirmation hearing, but became known only after that date as a result of the delay of the § 341 meeting.

ORDER

Pursuant to the foregoing IT IS THE ORDER OF THIS COURT that the plan is confirmed pursuant to the terms of the Order Confirming Plan dated March 25, 2002, contingent upon Debtor's attending the § 341 Meeting of Creditors when his military duties will reasonably allow him to be present; and it is

FURTHER ORDERED, that James C. Carstarphen, Jr., Debtor, shall advise the Trustee in this case within thirty (30) days following termination of his military service, his return to the United States, or his ability to appear for examination as required by 11 U.S.C. § 343, whichever occurs first; and it is

FURTHER ORDERED, that the time for filing claims in this case against this Debtor, for filing objections to confirmation, motions to revoke confirmation, or for filing of complaints pursuant to 11 U.S.C. §§ 523(c) and 1328, shall be extended until thirty (30) days after conclusion of the meeting of creditors to be scheduled hereafter.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 13th day of June, 2003.